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NO. 82 534

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DUKE UNIVERSITY, INC., et. al.,
Respondent

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DR. HOWARD E. STRAWCUTTER, et. al.,
Respondent

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

I. 1.A. THE COURT OF APPEALS BELOW CLEARLY FOLLOWED THE HARVEY ALUMINUM DEFINITION OF THE WORD "ACTION" IN RULE 41(a). 1

B. IF THE FOURTH CIRCUIT'S DENIAL OF PLAINTIFF'S RULE 41(a)(1)(ii) CLAIM WAS ACTUALLY BASED ON THE COURT'S PERCEPTION THAT A TRIAL COURT HAS DISCRETION TO ACCEPT OR DENY SUCH A STIPULATION OF DISMISSAL (AS DEFENDANT-RESPONDENTS NOW CLAIM) THEN THAT HOLDING IS CERTAINLY IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS. 4

2. THE FACTUAL BACKGROUND OF THIS CASE SQUARELY PRESENTS SEVERAL IMPORTANT QUESTIONS REGARDING FEDERAL RULE OF CIVIL PROCEDURE 41 WHICH RECUR CONTINUALLY AND CAN ONLY BE RESOLVED BY THE SUPREME COURT; FURTHER, SINCE THIS CASE INVOLVES RULES 41(a)(1), 41(a)(2) and 41(b), THIS COURT HAS AN OPPORTUNITY TO CONSISTENTLY AND CONCLUSIVELY INTERPRET THE OPERATIVE TERM "ACTION" THROUGHOUT RULE 41. 6

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE ALLOWED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE. THE STRAWCUTTER DEFENDANTS INVOKE LOCAL RULE OF PRACTICE 26.06 IN THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI. IN THE CONTEXT OF THIS CASE, HOWEVER, THAT RULE IS A RED HERRING. 9

TABLE OF AUTHORITIES

CASES	PAGE
First National Bank of Toms River N.J. v. Marine City, Inc., 411 F.2nd 674 (3rd Cir. 1969)	5
Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2nd 105 (2nd Cir., 1953), cert. denied, 345 U.S. 964 (1953)	2
In Re International Business Machines Corporation, No. 1406 (2nd Cir. August 13, 1982).	6

I. 1.A. THE COURT OF APPEALS BELOW CLEARLY FOLLOWED THE HARVEY ALUMINUM DEFINITION OF THE WORD "ACTION" IN RULE 41(a).

Defendant-respondents "concede that there is a dichotomy in the decisional law with respect to the question of whether the dismissal of an 'action' under Rule 41(a) may be limited to claims or causes of action against one of several defendants" (Respondent's Brief pp.7-8). They argue, however, that this question was "not addressed" by the Court of Appeals below and discount "Petitioner's contentions that the Fourth Circuit has now adopted the Harvey Aluminum rule. . ." (Id. p.7).

Defendants' argument is predicated on their misconception that the word "action" can have different meanings within the same sentence of Rule 41(a) and, with this misconception dispelled, the Rule 41(a) issues presented in this appeal are, in fact, clearly raised by the opinion below. Rule 41(a)(1) reads in relevant part as follows:

> . . . an action (#1) may be dismissed by the plaintiff without an order of court. . . by filing a stipulation of dismissal signed by all parties who have appeared in the action (#2) (emphasis and numerals added).

Rule 41(a)(2) reads in relevant part as follows:

> Except as provided in paragraph (1) of this subdivision of this Rule, an action (#3) shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper (emphasis and numeral added).

Defendant argues, in effect, that the Court of Appeals did not face the question of how to define "action #1" and "action #3" but defendant ignores the fact that the lower Court did, indeed, define "action #2" by following the errant interpretation of that word enunciated in Harvey Aluminum, Inc v. American Cyanamid Co., 203 F.2d 105 (2nd cir. 1953), cert. denied, 345 U.S. 964 (1953).

The concurring opinion in the Court of Appeals states that "because [plaintiff] did not receive the consent of all defendants, he was unable to proceed within the letter of Rule 41(a)(1)(ii)" (Petition for Writ of Certiorari

p.72). Since plaintiff had received the consent of all defendants to be dismissed, it is clear that the writer of this opinion interpreted "action #2" as encompassing all of the claims against all of the defendants - the Harvey Aluminum definition of "action." The primary opinion directly cites Harvey Aluminum and dismisses plaintiff's Rule 41(a)(1)(ii) argument with the comment that plaintiff's "stipulation" of dismissal was only "allegedly signed by all parties who had appeared in the action" (emphasis added) (Petition for Writ of Certiorari p.54). Again, since plaintiff had received the consent of all defendants to be dismissed, it is clear that the Court interpreted "action #2" as encompassing all of the claims against all of the defendants and denied plaintiff's Rule 41(a)(1)(ii) claim based on that erroneous definition.

Plaintiff disputes defendants' implied contention (explicitly argued in their brief below) that the word "action" can have opposite

meanings within the same sentence of Rule 41(a). All rules of grammar, logic and statutory construction refute defendants' position and this Court must recognize that the very fact that defendants have raised such an argument reveals the degree of confusion which has arisen around Rule 41(a).

Admittedly the Court of Appeals below did not explicitly state that a Rule 41(a) dismissal could not be effected against less than all of several defendants and did not explicitly state that it was following the minority view of Harvey Aluminum - a view soundly criticized by virtually every scholar and court to face the issue. Like personal transgressions, however, judicial error is seldom advertised by the wrongdoer and this Court should not close its eyes to the Fourth Circuit's furtive courtship of the fallen Harvey Aluminum doctrine.

B. IF THE FOURTH CIRCUIT'S DENIAL OF PLAINTIFF'S RULE 41(a)(1)(ii) CLAIM WAS

ACTUALLY BASED ON THE COURT'S PERCEPTION THAT A TRIAL COURT HAS DISCRETION TO ACCEPT OR DENY SUCH A STIPULATION OF DISMISSAL (AS DEFENDANT-RESPONDENTS NOW CLAIM) THEN THAT HOLDING IS CERTAINLY IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Defendants have conceded that the issue of whether or not plaintiffs effected a Rule 41(a)(1)(ii) dismissal was properly preserved for appeal (Petition for Writ of Certiorari p.58). A stipulation of dismissal under Rule 41(a)(1)(ii) is either effective or not effective and the trial court's approval or disapproval is irrelevant, First National Bank of Toms River, N.J. v. Marine City Inc., 411 F.2d 674(3rd Cir. 1969). Respondent's brief repeatedly states, without authority, that the question of whether or not a plaintiff has invoked a valid stipulation of dismissal is a matter to be determined within the sound discretion of the trial court. If the Fourth Circuit's denial of plaintiff's Rule 41(a)(1)

(ii) claim was actually based on the Court's perception that a trial court has discretion to accept or deny such a stipulation of dismissal (rather than on a perception that consent is required by all parties to the lawsuit under Harvey Aluminum) then that holding sanctions a trial court's "veto" of an otherwise effective stipulation of dismissal. Such a holding is not only in conflict with the decisions of other Federal Courts of Appeal, but it is also utterly without precedent. Indeed, the Second Circuit has recently held that even in an anti-trust action and even over the strenuous objections of the trial court, a plaintiff and defendant have an absolute right to terminate their litigation under Rule 41(a)(1)(ii), In Re International Business Machines Corporation, No. 1406 (2nd Cir. August 13,1982).

2. THE FACTUAL BACKGROUND OF THIS CASE SQUARELY PRESENTS SEVERAL IMPORTANT QUESTIONS REGARDING FEDERAL RULE OF CIVIL PROCEDURE 41 WHICH RECUR CONTINUALLY AND CAN ONLY BE

RESOLVED BY THE SUPREME COURT; FURTHER, SINCE THIS CASE INVOLVES RULES 41(a)(1), 41(a)(2) and 41(b), THIS COURT HAS AN OPPORTUNITY TO CONSISTENTLY AND CONCLUSIVELY INTERPRET THE OPERATIVE TERM "ACTION" THROUGHOUT RULE 41.

In section I.3. of their Brief in Opposition, respondents argue that "the unusual factual background of this case makes it unlikely that similar situations will recur" (p.21). It is true that the brain-damaged Sammy Morrell has been deprived of an opportunity to seek compens' 'on for adequate nursing and rehabilitative care based on an incredible and unusual chain of events. The procedural issues which led to this manifestly unjust result, however, arise at least implicity on each occasion where a dismissal is sought in federal court against less than all of several defendants - whether at the plaintiff's instance under Rule 41(a) or at the defendant's instance under Rule 41(b).

Indeed, the complicated factual development of this case provides this Court with an

excellent opportunity to analyze the policies behind Rule 41 and to conclusively and consistently define the operative term "action" at its various appearances in the Rule. Multi-party litigation is becoming increasingly more common and the time has come for this Court to fully and finally determine the correct procedure for dismissing one of several defendants - a procedure alluded to but not defined by the Fourth Circuit (Petition for Writ of Certiorari, p.50).

In 1953 this Court refused certiorari in the Harvey Aluminum case and in the ensuing 29 years the lower federal courts have agreed, almost unanimously, that the Harvey Aluminum doctrine is fallacious. At this point in time, courts no longer openly embrace that doctrine but the minority case law still exists, like an unused well, with no function save as a trap for the unwary. Sammy Morrell stands, today, at the bottom of that well and only this Court can intervene to lift him out and block off the trap left by Harvey Aluminum.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE ALLOWED WITH RESPECT TO THE ISSUE ARISING UNDER RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE. THE STRAWCUTTER DEFENDANTS INVOKE LOCAL RULE OF PRACTICE 26.06 IN THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI. IN THE CONTEXT OF THIS CASE, HOWEVER, THAT RULE IS A RED HERRING.

It is true that the local rules require counsel to submit proposed instructions prior to trial and that the proposed instructions filed by plaintiff did not include informed consent language. The informed consent issue only arose during the trial, however, when the defendants testified - in contradiction to Sammy Morrell's medical records - that they had actually diagnosed his perinephric abscess prior to transferring him to Duke Medical Center. Even if Local Rule 26.06 were held to take priority over Federal Rule 51, the circumstances of this case could not preclude the plaintiff from requesting an informed consent charge after the defendants' surprise testimony.

Respondents' recitation of the facts is somewhat misleading. It is true that at the charge conference respondents argued that the language of the pattern jury instructions on informed consent did not fit the facts of the case and would have been misleading and confusing to the jury. At the charge conference, however, the trial court agreed with the arguments of plaintiff's counsel that the applicability of such instruction outweighed any possible confusion. It was only after closing arguments had already been made that the court, in violation of Rule 51, changed its position and deleted the informed consent charge. The issue in the Stawcutter appeal is clear and of significance to all federal litigants: does Rule 51 allow a trial court to delete critical instruction agreed to at the charge conference after closing arguments have already been made? Plaintiff respectfully requests that this petition for a writ of certiorari be granted in order to fully explore the issue discussed herein.

This 3 day of ~~October~~ November, 1982.

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CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day served Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari upon each of the attorneys of record of Respondent by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to each of said attorneys at their respective last known mailing addresses, they being:

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